

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 08-037128

Employee: Michael Starks
Employer: Conway Central Express, Inc.
Insurer: Indemnity Insurance Company of North America
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 21, 2011. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 21, 2011, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 8th day of November 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Michael Starks Injury No.: 08-037128
Dependents: N/A Before the
Employer: Conway Central Express Inc. **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Indemnity Insurance Co. of North America
C/O Constitution State Services
Hearing Date: October 19, 2010 Checked by: KOB:dwp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 2, 2008
5. State location where accident occurred or occupational disease was contracted: Indianapolis, IN
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While exiting a forklift, Claimant caught his foot, twisted his ankle, and fell.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left ankle and leg
14. Nature and extent of any permanent disability: 110% of the left lower extremity at the 155 level.
15. Compensation paid to-date for temporary disability: \$80,198.16
16. Value necessary medical aid paid to date by employer/insurer? \$211,445.75

- 17. Value necessary medical aid not furnished by employer/insurer? n/a
- 18. Employee's average weekly wages: \$1,500.00
- 19. Weekly compensation rate: \$742.72/\$389.04
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

170.4/7 weeks of permanent partial disability from Employer:	\$66,359.11
Less credit for overpayment of 69 5/7 weeks TTD for period from MMI to the date of hearing	- (\$51,778.19)
0 weeks of disfigurement from Employer:	\$0.00
TOTAL FROM EMPLOYER:	<u>\$14,580.92</u>

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:

Weekly differential (\$353.68) payable by SIF for 170 4/7 weeks beginning June 18, 2009 to and, thereafter, \$742.72 weekly for Claimant's lifetime:

As of date of trial, differential due is:	\$ 24,656.55
Remaining differential and future permanent total benefits due:	Indeterminate

TOTAL FROM SECOND INJURY FUND: Indeterminate

23. Future requirements awarded: Medical treatment from Employer as described in the Award.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Paul Horgan, 34 N. Brentwood Blvd, Suite 7, Clayton, Mo, 63105

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Michael Starks	Injury No.: 08-037128
Dependents:	N/A	Before the
Employer:	Conway Central Express Inc.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Indemnity Insurance Co. of North America	Department of Labor and Industrial
	C/O Constitution State Services	Relations of Missouri
Hearing Date:	October 19, 2010	Jefferson City, Missouri
		Checked by: KOB:dwp

PRELIMINARIES

The matter of Michael Starks (“Claimant”) proceeded to hearing to determine the nature and extent of Claimant’s disability. Attorney Paul Horgan represented Claimant. Attorney Reid Highlander represented Conway Central Express (“Employer”) and Indemnity Insurance Company of North America c/o Constitution States Services (“Insurer”). Assistant Attorney General Kristen Frazier represented the Second Injury Fund.

The parties stipulated that on or about May 2, 2008, Claimant had an accident that arose out of and in the course of employment with an Employer subject to the Missouri Workers’ Compensation Act. The parties further stipulated that venue was proper in the City of St. Louis, Employer received proper notice, and Claimant filed his claim within the time required by law. At the time of the accident, Claimant earned an average weekly wage in excess of \$1,500.00, which corresponds to a rate of compensation of \$742.72 for temporary total disability (“TTD”) and permanent total disability (“PTD”) benefits. The rate for permanent partial disability (“PPD”) benefits is \$389.04. The parties stipulated as of the date of the hearing, Employer paid weekly benefits to Claimant for 106 4/7ths weeks at the rate for TTD, or \$80,198.16, and \$1,046.42, for a few days of temporary partial disability benefits at the end of June and July, 2008.¹ Employer paid \$211,445.75 in medical expenses thus far, and stipulated that if a finding is made connecting the accident to the need for a prosthetic leg, Employer will provide all future medical care related to the reasonable and necessary treatment, and management of the device.

Issues to be determined by way of hearing are: 1) Are the events of May 2, 2008 the prevailing factor in Claimant’s current medical condition; 2) What is the nature and extent of Claimant’s permanent disability; 3) What is the liability of the Second Injury Fund; 4) Is Claimant entitled to disfigurement, and if so, in what amount?

¹ These are the figures stipulated to by the parties. While the monetary and week totals do not seem to add up to the 128 3/7 weeks between the date of injury and hearing, I am bound by the stipulated facts. Stipulations are controlling and conclusive, and the courts are bound to enforce them. *Spacewalker, Inc. v. American Family*, 954 S.W.2d 420, 424 (Mo.App. E.D.1997).

SUMMARY OF THE EVIDENCE

All testimony and evidence has been considered, but only the evidence necessary to support the award will be reviewed and summarized. To the extent any documents contain marks, such were made prior to being received into evidence.

Claimant's Testimony and other Documents

Claimant is a 59 year old married man who was employed with Employer from 1995 through April 2010 as a truck driver. His last assignment was to deliver a set of trailers to Indiana, unload, and reload for the return trip. In May 2008, he generally worked from 6:00 or 7:00 in the evening until 6:00 or 7:00 in the morning five days a week. During a single shift he was able to make a round trip.

Preexisting Disabilities

Despite a strong work history, Claimant had several preexisting injuries that constitute a hindrance or obstacle to employment. Claimant was born with spina bifida and underwent surgery shortly after birth to address the defect. As a result of his congenital condition, Claimant has had problems, including back pain, periodic bladder control problems, pain, sensation disturbance, leg length discrepancy, altered gait, and balance problems. In 1998, another back surgery was recommended, but he had a heart attack and never underwent the surgery. Claimant has missed work over the years due to his congenital back condition.

In the early 1960's, a car door slammed on Claimant's left foot, and the toes on his left foot were amputated. He played sports and engaged in other high school activities, although he did limp as a result of his toe amputation. Over the years, Claimant modified his activities to account for the loss of his toes. Later in his career, Claimant had a metal plate inserted in his shoe to substitute for the missing toes so he was able to drive a truck.

In the late 1990's, Claimant had a heart attack and underwent a triple bypass surgery to address his coronary artery disease. Because of his coronary artery disease, Claimant had decreased endurance and trouble functioning in temperature extremes. Claimant returned to work after his heart attack. He was on blood pressure medication and had difficulties with unusually cold days or in hot temperatures.

In 2005, Claimant injured his right bicep when he was closing the roll down door, which he settled for 20% permanent partial disability. As a result, Claimant is weaker and less flexible, has had to modify the way he lifts, requires more trips, and has had to ask for assistance.

In 2006, Claimant was diagnosed with avascular necrosis of the left medial femoral condyle, and underwent total knee replacement, which was subsequently revised. As a result, he was slower, he could not lift as much, and he had trouble walking.

Primary Injury

On May 2, 2008, Claimant drove from St. Louis to Indianapolis. While exiting a forklift in Indiana, he caught his foot stepping out of the fork lift, fell, heard a pop, and hit the ground on his left shoulder. Immediately his left ankle hurt and began to swell. Claimant reported the incident to the sector desk and continued to work, hooking a trailer to his truck and beginning the return trip to St. Louis. After a stop in Salem, Illinois, where he switched the back trailer, Claimant returned his truck to Employer's location. At that time, Claimant's foot was swollen and painful, and his boot was tight. His shoulder was fine. Claimant reported the accident to Doug Damage, who indicated he would fill out the necessary paperwork. Claimant went home, showered, and went to bed. At that time he noticed his leg was swollen and red.

The next morning, Claimant dressed, left for work, and stopped at Target to pick up cold medicine. Crossing the parking lot, Claimant experienced a rolling sensation of his left lower extremity, and despite adjusting his boot, his foot continued to feel unsteady and painful. Therefore, he returned to his car without making his purchase. When he looked down, he realized he was standing in a pool of blood, and had a complex fracture of his left ankle.

Medical Treatment

Claimant drove himself to the DePaul Hospital emergency room, and ultimately underwent surgery by Dr. Shore, who had previously performed Claimant's left knee replacement. Employer then authorized Dr. Krause to provide treatment. Dr. Krause removed the hardware and performed several surgeries to address the infection which occurred from the complex fracture. Claimant's leg never properly healed, and after significant treatment attempts, his left leg was amputated below the knee to prevent the spread of a potentially fatal infection.

Claimant was fitted with a prosthetic leg. However, Claimant experienced swelling and shrinking of the stump, which rendered the prosthetic leg ill-fitting. In February 2009, Dr. Krause initially found Claimant to be at maximum medical improvement and released him from treatment. At that time, Claimant was wearing the prosthetic leg notwithstanding the fit problems.

Thereafter, Claimant attempted to return to work, but he failed the Department of Transportation physical because he could not feel the clutch with his prosthetic leg. Claimant completed functional rehabilitation using a prosthetic device. On June 17, 2009, Claimant returned to Dr. Krause who released him at MMI with restrictions including no driving for work; no climbing; and no lifting over 30 pounds. When Claimant tried to return to work with Employer again he was told there were no jobs available for him.

Soon thereafter, Claimant developed an open sore at the bend of his stump. Dr. Krause ordered him out of the prosthesis, performed several surgical wound care procedures, and referred Claimant to Dr. Macklin for wound care. He performed surgical wound care, skin grafts, and embryonic cell treatment. Claimant continues to treat with Dr. Macklin, and has successfully achieved closure of the wound as of October 6th or 7th of 2010. Dr. Macklin wanted Claimant to have a new prosthesis, which he is in the process of obtaining. Claimant has

attempted to ease back into use of his current prosthesis by wearing it a few hours a day around the house. However, he continues to mostly use his crutches.

Claimant experiences several physical problems that he associates with his May 2008 work injury. His low back and right leg often cramp and are painful. Claimant's left stump continues to swell and shrink. He limits the time he spends sitting or being in one position for long periods. Claimant has significant pain in his back that he associates with the use of the crutches. His ability to walk or ride in a car is affected by his amputation.

Over the last two years, Claimant estimated he used his prosthetic device for 4 or 5 months. He uses his crutches daily. As a result of his use of crutches, he has no balance when he attempts to reach overhead. He has given up hobbies like hunting and limited his fishing. He spends time reading or performing light housework like doing the dishes or making the bed. Other than the GED and truck driver certification he earned, Claimant has no further vocational training. Claimant testified candidly he can drive for a couple of hours. He demonstrated his only comfortable position by standing facing the back of a chair with his leg tucked underneath him on the seat of the chair and his elbows on the back of the chair. This is comfortable because his leg is not dangling.

In the spring of 2009, Claimant attended a six week training course to become a court appointed special advocate ("CASA"). The training consisted of one and a half to two hours at a time. Claimant has continued his CASA work providing life skills to youths who are involved in the court system. This position is a volunteer position. It involves 3 to 4 hours per week, a majority of which is over the phone. Claimant meets with his ward approximately one and a half hours a week.

In April, 2010, Claimant received a letter from Employer ("Exhibit M"). The letter indicated that Claimant was not fit for any employment Employer had to offer. There were no job offers contained in this letter, although Claimant is aware Employer has maintenance schedulers, service clerks, and dispatchers on its payroll.

Other Documents

As proof of pre-existing disability, Claimant offered Exhibits K and L. Exhibit K, approved by the Division of Workers' Compensation on December 14, 2006, documented a compromise lump sum settlement of \$16,209.55, representing 20% permanent partial disability of the right arm at the 222 week level. Moreover, Exhibit L, approved by the Division of Workers' Compensation on June 13, 2007, documented a compromise lump sum settlement between the Second Injury Fund and Claimant of \$11, 989.23, representing preexisting disability of 40% body as a whole referable to the spine due to spina bifida; 15% of the body as a whole referable to coronary artery disease; and 40% of the left leg at the level of the knee-160 week level.

Opinion Evidence

Dr. David Volarich examined Claimant no less than twice, took a history consistent with the trial evidence, reviewed relevant medical records, issued reports, and testified on behalf of

Claimant by deposition. I find Dr. Volarich's testimony to be credible and consistent with the evidence and findings herein.

Dr. Volarich testified within a reasonable degree of medical certainty that the May 2, 2008 accident at work was the prevailing factor causing the tibia and fibula fractures that required an open reduction, internal fixation and ultimately, the below knee (6 inches above the ankle) amputation of Claimant's left leg. Dr. Volarich testified he had documented significant sensory loss below the knee prior to the primary accident that he attributed to Claimant's preexisting spinal disability. He was thus able to provide a reasonable explanation as to why Claimant had a delayed realization of his broken ankle.

He also found Claimant had a worsening of his back pain, and documented the objective findings in his spine had worsened since a previous exam in 2006. Thus, he also attributed a significant aggravation of his lumbar syndrome and left lower extremity paresthesias to the work accident of May 2, 2008. Although Claimant will require ongoing adjustments for the prosthesis and treatment for the back pain, Dr. Volarich found Claimant at maximum medical improvement. Dr. Volarich rated Claimant's disability as 100% of the leg at the 160 week level and 15% of the body as a whole relative to the lumbosacral spine.

Dr. Volarich also opined as to the nature and extent of Claimant's preexisting permanent partial disabilities. He attributed 65% of the whole body to the spina bifida and complications such as bladder dysfunction; 30% of the body as a whole to heart disease; 65% of the left lower extremity at the calf for his amputated toes; and 35% of the biceps tendon from the 2005 injury.

Dr. Volarich testified that based upon his medical assessment alone, it was his opinion that Claimant was permanently and totally disabled as a result of the May 2, 2008 work-related injury in combination with all of his preexisting conditions. Dr. Volarich noted that the combination of Claimant's disabilities created a substantially greater disability than the simple sum or total of each separate injury or illness and that a loading factor should be added.

Dr. John Krause, aboard certified orthopedic surgeon who provided authorized treatment, testified by deposition that people such as Claimant who have neuropathy can have fractures and have little or no pain. He recounted the many treatment modalities he tried, alone and in conjunction with other doctors, to save Claimant's leg and life. He also detailed the post-amputation recovery process and complications. Dr. Krause found Claimant at MMI on June 17, 2009 with permanent restrictions of no driving for work, no climbing, and no lifting greater than 30 pounds. Thereafter, Claimant returned for treatment of open sores associated with the use of his prosthetic leg, which lead to a referral to wound care specialist, Dr. Melvin Maclin, whose records he reviewed. Dr. Krause could not determine the cause of the ulcerated wound.

Based on his first hand knowledge, and the records he reviewed, Dr. Krause was of the opinion the work accident was the prevailing factor in the fracture of the tibia and the fibula . Claimant has permanent partial disability equivalent to 100% left lower extremity at the ankle. He did not restrict Claimant from working, but did give him permanent work restrictions.

Dr. Melvin Maclin, a board certified plastic surgeon, treated a pressure wound on Claimant's left stump complicated by infection beginning October 13, 2009. His three step

approach involved getting control of the wound, building up the base of the wound with a Wound Vac, and closing the wound with a skin graft. By March 22, 2010, Claimant was cleared to use his prosthesis, but in June another pressure ulcer arose, and more treatment with complications followed. He testified Claimant is going to be at risk for breakdown anywhere there is pressure and he knew Claimant's neuropathy would complicate healing. He agreed all the problems for which he treated Claimant flow from his work injury, and Claimant was always going to have stump management issues, including possible further amputation. His treatment of Claimant continued up to hearing. Future treatment will include that reasonable and necessary to fit and maintain the prosthesis, and monitor and treat ulcerations.

Timothy Lalk, a vocational rehabilitation counselor, testified on behalf of Claimant. Among other findings, Mr. Lalk identified preexisting disabilities to Claimant's back, heart and left foot, and described how each was a hindrance and obstacle to employments (required help from coworkers, had daily aching pain with shortness of breath, and loss of feeling, respectively).

Regarding his ability to work, Mr. Lalk testified that he did not believe Claimant was reasonably able to compete in the open labor market. Moreover, Mr. Lalk did not believe Claimant would be able to secure and maintain employment in the open labor market. According to Mr. Lalk, it was a combination of his May 2, 2008 work accident in concert with his pre-existing conditions that totally disabled Claimant from work. On cross examination, Mr. Lalk admitted that Claimant may have some potential for vocational rehabilitation if he could consistently wear the prosthetic leg.

Donna Abram is the vocational rehabilitation counselor who testified on behalf of Employer. If she were to just consider the work related injury, his background and the opinion of Dr. Kraus, Ms. Abram felt Claimant was both employable and placeable. Yet when she factors in his age, his unrelated medical conditions, all his physical problems, his lack of experience outside trucking, and his attitude, she found it doubtful he would have a successful job search. Accordingly, she agreed with Dr. Volarich that Claimant can no longer actively work in the open labor market due to a combination of factors, most of which are unrelated to the work injury.

FINDINGS OF FACT AND RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

- I. The events of May 2, 2008 are the prevailing factor in Claimant's current medical condition.

"The claimant in a worker's compensation case has the burden to prove all essential elements of [his] claim including a causal connection between the injury and the job." *Royal v. Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 376 (Mo.App. W.D.2006)(internal quotation marks and citations omitted), *cited in Bond v. Site Line Surveying*, 322 S.W.3d 165, 170 (Mo.App. W.D. 2010). Section 287.020.3(1) provides, in part, as follows, "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary

factor, in relation to any other factor, causing both the resulting medical condition and disability.” Mo.Rev.Stat. § 287.020.3(1) Supp.2006; *Savage v. Treasurer of Missouri as Custodian of Second Injury Fund*, 308 S.W.3d 771, 775 (Mo.App. E.D. 2010). Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the condition and the disability. *Mc Grath v. Satellite Sprinklers' System*, 877 S.W. 2d 704, 708 (Mo App. 1994).²

In this case, all the evidence supports a finding that the work accident is the prevailing factor in causing Claimant’s injury and disability. On May 2, 2008, while exiting a forklift in the course of his employment, Claimant caught his left foot, which resulted in a fracture of his left tibia and fibula. The complications that arose as a result lead to the amputation of lower left leg. Claimant’s testimony on this issue was clear, consistent and credible. Moreover, all the medical evidence supports a finding in favor of Claimant on causation.

In this case, three different qualified physicians provided opinion testimony regarding the cause of Claimant's injury and disability. Dr. Krause, Employer's authorized treating orthopedic surgeon, opined that the work accident of May 2, 2008 was the prevailing factor in the fracture of the claimant's tibia and the fibula. Dr. Maclin, Employer's authorized treating wound specialist, testified the reason Claimant needed to have medical treatment was the fracture of the tibia and fibula that occurred on May 2, 2008, the reason Claimant had to have an open reduction and internal fixation above the left ankle was because of the fracture Claimant sustained in his work accident, and the cause of the need for the below knee amputation was the osteomyelitis which developed from his work-related medical care. Dr. Maclin noted that all of the medical treatment was a sequelae of the injury. Finally, Dr. David Volarich, Claimant's rating physician, testified within a reasonable degree of medical certainty, that the May 2, 2008 fall at work was the prevailing factor causing the tibia and fibula fractures that required an open reduction, internal fixation and ultimately, the below knee amputation of the claimant's left leg.

The fact that there was a delay between the accident and the discovery of the injury is well explained by the medical evidence. Although the defense used phrases such as “difficult to believe” and “questionable” in describing Claimant’s account of his injury, a reasonable explanation for Claimant’s inability to perceive his fractures lies in the medical evidence. Claimant’s preexisting neuropathy was well established, and the experts agree profound neuropathy could dull or completely mask an injury such as Claimant’s. There is no credible evidence to challenge Claimant’s version of his accident and injury. Claimant’s May 2, 2008 work accident is the prevailing factor in his current medical condition.

II. Medical Treatment.

The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). The parties stipulated that if a finding is made connecting the accident to the need for a prosthetic leg,

² This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

Employer will provide all future medical care related to the reasonable and necessary treatment, and management of the device. Having found in favor of Claimant on the issue of causation, I further find Employer liable for all reasonable and necessary medical treatment to cure and relieve Claimant from the effects of his injury. This includes all medical treatment to maintain the health of Claimant's left leg stump, particularly but not exclusively to address the issue of ulcerations and complications which may arise there from. Furthermore, as anticipated by the parties, Employer shall provide all treatment and care necessary for Claimant to have a functioning prosthetic leg, including maintenance and replacement of the prosthesis itself.

III. Nature and extent of Claimant's Permanent Disability – Primary Injury.

Claimant has successfully established his right to recover permanent partial disability compensation from Employer. Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. *Sanders v. St. Clair Corp.*, 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). Section 287.190 sets out the schedule to be paid for permanent partial disability. An injury to the left lower extremity above the ankle and below the knee is scheduled for 155 weeks. Subsection 2 states: "If the disability suffered ... is total by reason of severance or complete loss of use thereof the number of weeks of compensation allowed in the schedule for such disability shall be increased by ten percent." Thus, an employer is liable for the loss of use premium. *Pierson v. Treasurer of State*, 126 S.W.3d 386, 390 (Mo. 2004).

There is no injury more infinitely enduring than an amputation. The evidence is uncontroverted that Claimant suffered his disability of the lower leg by reason of severance of the limb above the ankle but below the knee, or 100% of the 155 level. Employer is also liable for the loss of use premium. Therefore, Employer's liability for the left leg alone is 170.5 weeks.

Claimant also seeks compensation for additional permanent partial disability of the spine due his amputation and resultant abnormal weight bearing. From birth, Claimant has had significant disability of the back associated with his spinal bifida, but according to the pre- and post-injury exams conducted by Dr. Volarich, there is objective evidence the spinal condition worsened after and was aggravated by the work injury.

Prior to the 2005 amendments to § 287.020, aggravation of a pre-existing condition arising out of and in the course of employment had been compensable, but the current version of § 287.020 restricts compensation to injuries in which the work accident was the *prevailing factor* in causing the resulting medical condition and disability. *Johnson v. Indiana Western Exp., Inc.*, 281 S.W.3d 885, 891-893 (Mo.App. S.D. 2009) *citing Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-9 (Mo.App. 2008). It is not sufficient that the event simply aggravates a preexisting condition. *Id.*; § 287.020. Dr. Volarich assigns additional disability due to the **aggravation** of his lumbar syndrome. I find injury of the ankle is not the prevailing factor in the condition of Claimant's spine. The fact his abnormal gait may well have aggravated his extensive preexisting condition may be a substantial factor in his current medical condition, but it is not the prevailing factor in the condition and disability. Employer is not responsible for the aggravation of Claimant's preexisting conditions.

IV. Disfigurement

Claimant seeks additional compensation for disfigurement due to the loss of his leg. Section 287.190.4 provides:

If an employee is seriously and permanently disfigured about the **head, neck, hands or arms**, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation (emphasis added).

Claimant has sustained a ghastly injury that caused a serious and permanent alteration of his body. However, the disfigurement is not about the head, neck, hands or arms. As § 287.800 requires me to construe the provisions of this chapter strictly (*Smalley v. Landmark Erectors*, 291 S.W.3d 737, 738 (Mo.App. E.D. 2009)), I must deny Claimant compensation for his disfigurement because it is not on the requisite body parts.

V. Second Injury Fund Liability

Claimant seeks to recover permanent total disability benefits from the Second Injury Fund. "Total disability is defined as the inability to return to any employment and not merely the employment at which the claimant was engaged at the time of the accident. The test for permanent total disability is the workers' ability to compete in the open labor market, in that it measures the workers' potential for returning to employment. The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this claimant in his or her present physical condition." *Lorentz v. Missouri State Treasurer*, 72 S.W.3d 315, 319 (Mo.App.S.D. 2002) citing *Reese v. Gary and Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. 1999).

I find Claimant to be permanently and totally disabled because no employer in the usual course of employment would reasonably be expected to hire Claimant in his present physical condition. Dr. David Volarich testified that based upon his medical assessment alone, it was his opinion Claimant was permanently and totally disabled as a direct result of the May 2, 2008 work-related injury in combination with all of the preexisting conditions. On behalf of the employer, Dr. Krause testified that the Claimant had 100% permanent disability of the left leg at the 155 week level (Employer's Exhibit 1-Page 30, lines 23-25; and Page 31, lines 1-3). On June 17, 2009, after reviewing the functional capacity evaluation from Pro Rehab, Dr. Krause placed permanent restrictions on Claimant of no driving for work; no climbing; and no lifting greater than 30 pounds. Dr. Krause felt Claimant was permanently and partially disabled from work not permanently totally disabled. Mr. Lalk testified that he did not believe Claimant was reasonably able to compete in the open labor market or that he would be able to secure and maintain employment in the open labor market. Ms. Abram found it doubtful Claimant would have a successful job search. In addition to the expert opinions, I find Claimant testified credibly, and that the medical records support a finding of permanent and total disability.

A finding Claimant is permanently and totally disabled does not address which party is liable for the associated benefits. In analyzing an alleged total disability case, "the first determination is the degree of disability from the last injury considered alone." *Landman v. Ice*

Cream Specialties, 107 S.W. 3d 240, 248 (Mo. banc 2003). If the employee's last injury in and of itself rendered him permanently and totally disabled, the Second Injury Fund has no liability; the employer is responsible for the entire amount of compensation. *Birdsong v. Waste Management*, 147 S.W. 3d 132, 138 (Mo. App. S.D. 2004).

I find Claimant is not permanently and totally disabled due to the last injury in and of itself. The overwhelming weight of the medical, expert and lay evidence supports a finding of total disability due to a combination of disabilities, not the last one alone. Dr. Krause, who treated and considered the leg alone, imposed work restrictions no driving for work; no climbing; and, no lifting greater than 30 pounds. He felt Claimant could compete in the open labor market considering the leg alone. If Ms. Abram were to just consider the work related injury, his background and the opinion of Dr. Kraus, she felt Claimant was both employable and placeable. See also, discussion on MMI below. Thus, Employer is responsible for PPD, not PTD benefits.

Second Injury Fund liability may be triggered if the employer is not responsible for total disability. In order to recover from the Second Injury Fund the claimant must prove a preexisting permanent partial disability whether from a compensable injury or otherwise pursuant to §287.220.1. The permanent disability pre-dating the injury in question must "exist at the time of the work related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should the employee become unemployed." *Messex v. Sachs Electric Company*, 989 S.W. 2d 206, 214 (Mo. App. E.D. 1999).

Claimant had a number of significant disabilities that existed at the time of his work related injury and were of such seriousness as to constitute a hindrance or obstacle to employment. The spinal bifida not only affected his back, but it caused urinary and nerve problems among others. The heart condition was further disabling, especially in the work setting. The prior disabilities established by Claimant meet the requirements for Second Injury Fund liability.

In addition, the overwhelming weight of the expert evidence supports a finding of PTD due to a combination. Dr. Volarich felt the PTD was due to a combination, and noted the combination of disabilities created a substantially greater disability than the simple sum or total of each separate injury. Mr. Lalk testified it was a combination of his May 2, 2008 work accident in concert with his pre-existing conditions that totally disabled Claimant from work. If Ms. Abram considered the combination of other factors including preexisting conditions, she found it doubtful Claimant would have a successful job search. Accordingly, she agreed Claimant was PTD due to a combination of factors.

Based on all the evidence, including Claimant's credible testimony, the medical records, and the nearly undisputed opinions of the experts, I find Claimant is permanently and totally disabled due to a combination of disabilities, and the Second Injury Fund is liable for PTD benefits as provided by law.

VI. MMI

Although the parties did not specifically list as an issue to be determined the date of maximum medical improvement ("MMI"), such a finding is necessary to address two issues

raised by the parties. First, the Second Injury Fund argues Claimant is not at MMI, and as a result a permanent award is premature. Second, Employer seeks a credit for temporary total disability benefits ("TTD") paid after the date of MMI. According to the post-trial briefs, Claimant and Employer agree the date of MMI is June 17, 2009.

The purpose of temporary total disability benefits is to cover the claimant's healing period. *Chatmon v. St. Charles County Ambulance Dist.*, 55 S.W.3d 451, 459 (Mo.App. E.D.2001). Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. *Id.*; *Tilley v. USF Holland Inc.*, 2010 WL 3681233, 4 (Mo.App. E.D. 2010). The point at which no further improvement is expected is referred to as the point of "maximum medical improvement." *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 821 (Mo.App. W.D.1995). Maximum medical improvement, however, is not inconsistent with the need for future medical treatment. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 890 (Mo.App. S.D. 2001)(citations omitted).

As to the issue raised by the Second Injury Fund, the Assistant Attorney General is correct to assert an award for permanent disability is permissible only if the claimant has reached MMI. In *Cantrell v. Baldwin Transp., Inc.*, 296 S.W.3d 17, 20 (Mo.App. S.D. 2009), the court explained:

A "permanent partial disability" is a disability that is permanent in nature and partial in degree. § 287.190.6(1). The level of permanent partial disability associated with an injury cannot be determined until the injury "reaches a point where it will no longer improve with medical treatment" or, in other words, reaches maximum medical improvement.

All the credible evidence establishes Claimant reached MMI on June 17, 2009. Dr. Krause, who treated the stump, declared Claimant at MMI, even though complications arose later. One week earlier, Dr. Volarich performed an exam and determined Claimant to be at MMI. Dr. Maclin did not see Claimant until after MMI, but he testified Claimant could require ongoing wound care of the type he provided, a proposition with which the other doctors agree. The likelihood of ongoing treatment and stump maintenance is magnified by Claimant's preexisting neuropathy, which makes Claimant unable to perceive pain and avoid further complications

Based on the substantial and competent, I find Claimant reached MMI on June 17, 2009. His condition has achieved the maximum benefit the doctors have to offer, and the treatment he received after MMI is in the category of maintenance, the type of which he will face throughout his lifetime. Because he reached MMI, an award of permanent disability is appropriate.

As for Employer's assertion, the obligation to pay TTD ceased when Claimant reached MMI. The purpose of temporary, total disability awards is to cover the employee's healing period, so ...temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo. App. W.D. 2000). Once further medical progress is no longer expected, a temporary award is no longer warranted. *Id.* I find further medical progress cannot be expected. Specifically, even if Claimant's wound healed and a prosthetic was well fit, there is no reasonable hope his condition would remain as such permanently. Rather, Claimant can expect fluctuation in his ability to wear his prosthesis for the rest of his life, and his condition

will not permanently progress beyond what it was on June 17, 2009. Accordingly, I will treat the TTD paid by Employer on and after June 18, 2009 as an advance against permanency, and credit Employer's liability accordingly.

VII. Conclusion & Calculation of Benefits

Employer is liable for 170 4/7 weeks of permanent partial disability benefits, or \$66,359.11. Having found Employer continued to make TTD payments of \$742.72 per week from June 18, 2009 (the day after MMI) to the day of trial on October 19, 2010 (69 5/7 weeks), I find Employer has made an advance payment of \$51,778.19 against the permanency herein awarded. Therefore, Employer shall immediately pay Claimant \$14,580.92. Employer's obligation to provided medical treatment is ongoing.

Where a preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for the compensation due the employee for permanent total disability, but only after the employer has paid the compensation due the employee on account of the disability resulting from the work-related injury. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. E.D. 1990). The liability for PTD commences on the date of MMI, but Second Injury Fund's initial obligation is to pay the differential between the PTD and PPD rates, in this case \$353.68, for the number of weeks representing Employer's PPD liability, or 170 4/7 weeks. Thus, beginning June 18, 2009, the Second Injury Fund is liable for the differential payment of \$353.68 per week for 170 4/7 weeks. From the date of injury to the date of hearing, the Second Injury Fund's liability is \$24,656.55. Payment of the differential shall continue through September 24, 2012, at which time the Second Injury Fund shall be liable for the full PTD weekly rate as provided by law.

This award is subject to a lien of 25% in favor of Attorney Paul Horgan for legal services.

Made by: _____
 KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to as of this _____ day of January, 2011.

 Naomi Pearson
Division of Workers' Compensation